

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 03364**

<p>■■ by parent or guardian, ■■■ Petitioner,</p> <p>v.</p> <p>Durham County Public Schools Board of Education Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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THIS MATTER is before the undersigned Administrative Law Judge (ALJ) on Respondent's Motion to Dismiss. The Undersigned having considered the entire record finds that the matter is now ripe for disposition on the issue of whether the Petition should be dismissed for Petitioner's failure to prosecute the case.

STANDARD OF REVIEW

Under civil procedure rules, sanctions for failure to prosecute may be entered where the Petitioner or his or her attorney "manifests an intention to thwart progress of an action to its conclusion" or "fails to progress the action toward its conclusion" by engaging in some delaying tactic. N.C. GEN. STAT. § 1A-1, Rule 41(b). See JONES v. STONE, 279 S.E.2d 13, 15, disc. Rev. denied 285 S.E.2d 99 (1981) and SMITH v. QUINN, 378 S.E.2d 28, 30-31 (1989). Whether a Petitioner or attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. See LINK v. WABASH R.R. CO., 370 U.S. 626, 633, 82 S.Ct. 1386, 1393, 8 L.Ed.2d 734, 739-40 (1962). Because the sanction of dismissal is not the only sanction available and is discretionary, dismissal is to be applied when "the trial court determines that less drastic sanctions will not suffice." See generally CHAMBERS v. NASCO, INC., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

FINDINGS OF FACT

1. Petitioners filed a Petition for Contested Case Hearing on or about June 4, 2018. The Petition was received by the Superintendent of the Durham County Schools on June 6, 2018.
2. Respondents filed a timely Notice of Insufficiency of Petition on June 13, 2018.
3. An Order of Determination of Insufficiency of Petition for a Contested Case Hearing was issued by this Tribunal on June 18, 2018, stating the following:

“Petitioners shall be permitted to file an amended complaint under title 20 United States Code section 1415(c)(2)(E)(i)(II). The filing of an amended complaint will restart the applicable timelines for a due process hearing. Per 34 CFR §300.508, “the timelines for the resolution meeting in §300.510(a) and the time period to resolve in §300.510(b) begin again.” The amended complaint shall comply with the requirements of title 20 United States Code section 1415 (b)(7)(A)(ii), and shall be filed not later than 21 days from the date of receipt of this order. If Petitioners fail to file a timely amended complaint, Respondent may file for dismissal.”

4. That Order was amended on July 6, 2018, amending the date for Petitioners to file a timely amended complaint to August 1, 2018. Petitioners did not file an amended complaint by August 1, 2018.
5. Respondent filed a Motion to Dismiss on August 2, 2018. The undersigned Administrative Law Judge (ALJ) requested a response to that motion from Petitioners and ordered that such be done on or before August 15, 2018.
6. To date, the Petitioners have not responded to the Motion to Dismiss. Further, Petitioners failed to file an amended complaint despite the Undersigned’s Order of June 18, 2018, and despite an extension of time for filing as set forth in the Undersigned’s July 6, 2018 Order.
7. Moreover, 26 NCAC 03. 0120 states that all “parties have the continuing responsibility to notify the Office of Administrative Hearings of their current address and phone number.” Petitioners have either (i) failed to notify the Office of Administrative Hearings of a current mailing address or (ii) have refused to accept documents sent via certified mail. As such, Petitioners have failed to satisfy a continuing responsibility to the Office of Administrative Hearings.
8. Petitioners have manifested an intention to thwart the progress of this contested case by failure to respond to the Motion to Dismiss filed with the Office of Administrative Hearings; and most importantly by failing to file a timely Amended Petition to remedy Petitioners’ complaint which was insufficiently pled under title 20 United States Code section 1415(c)(2). Respondent is unable to proceed on an insufficient Petition for Contested Case Hearing. By failure to file an Amended Petition and failure to respond to the Respondent’s motion despite orders by the Undersigned, Petitioners have appeared to the Undersigned to have abandoned this contested case.
9. The Undersigned has considered actions less drastic for disposing of this contested case and determines that less drastic actions will not suffice. The lack of any response whatsoever to the Office of Administrative Hearings prohibits even an examination by the ALJ of excusable neglect by Petitioners. No less action than disposing of this case by dismissal would be effective in ensuring compliance with State and Federal laws as well as the orders of the Undersigned, and would best serve the interests of justice.

CONCLUSION OF LAW

Disposition of this case by dismissal of the Petition because of the Petitioners' failure to prosecute in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33(b) and N.C. GEN. STAT. § 1A-1, Rule 41(b) of the North Carolina Rules of Civil Procedure is reasonable, appropriate and lawful.

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the Conclusion of Law noted above and imposes sanctions. It is hereby **ORDERED** that this contested case be **DISMISSED** with prejudice.

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision. Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section." Inquiries regarding the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

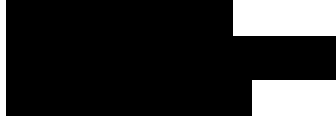
This the 17th day of August, 2018.



Augustus B Elkins II
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:



Parent

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Affiliated Agency

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Attorney for Respondent

This the 17th day of August, 2018.

A handwritten signature in blue ink, reading "Anita M. Wright", positioned above a horizontal blue line.

Anita M Wright
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